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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN WAYNE JOHNSON,

Defendant and Appellant.

B169144

(Los Angeles County  
Super. Ct. No. NA054968)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Mark C. Kim, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,  
Marc J. Nolan and Kenneth J. Kao, Deputy Attorneys General, for Plaintiff and  
Respondent.

Kevin Wayne Johnson appeals from judgment entered following a jury trial in which he was convicted of second degree robbery (Pen. Code, § 211) with a finding that he personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (b), and of being a felon in possession of a gun (Pen. Code, § 12021, subd. (a)(1)). Sentenced to prison for a total of 13 years, he contends that reversal is required because the trial court failed to adequately adjudicate his claim that the prosecutor had excused prospective jurors on racial grounds. For reasons explained in this opinion, we affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

At approximately 9:45 p.m. on November 17, 2002, Remedios Montayre left her apartment to pick up her husband. She walked to the street with her keys and handbag in her hand and saw appellant walking and carrying a gun. Ms. Montayre ran to her neighbor's apartment, but her neighbor did not answer the door. Appellant confronted Ms. Montayre and while pointing a gun at her, ordered her to give him her keys and bag or else he would kill her. Ms. Montayre was frightened and gave him these items. When appellant fled, Ms. Montayre immediately ran to her niece's home, which was nearby, and they called 911. Shortly thereafter police took Ms. Montayre to the area where appellant had been detained and Ms. Montayre positively identified appellant as the robber. She was one hundred percent sure of the identification. Ms. Montayre had seen appellant earlier that morning when he approached her and asked her for money.

The police found Ms. Montayre's purse on the grass in front of the residence, her keys in appellant's pocket, and appellant's gun across the street in a shopping cart.

## DISCUSSION

Appellant made a *Wheeler*<sup>1</sup> motion, noting “[Appellant] is entitled to jurors of his peers. There aren’t many African-American men in the audience, let alone women in the audience or people of color. Counsel has excused two African-Americans. I believe we only have one African-American male left sitting in the audience.” When the court inquired of defense counsel whether “there is a pattern” and whether she had established such a showing, counsel indicated “yes.” The court disagreed but stated it would be best if the prosecution stated why it had excused the potential jurors.

The prosecution then explained, “the first juror had--he was wearing his shirt out and I thought he was a gang member when he walked in. I was shocked when he said he worked for airport security so that is why I kept questioning him to see how long and what his attitude was. I found him to have an overly lackadaisical attitude. I certainly wouldn’t want him checking my bags or checking the bags. He seemed overly relaxed and his gang member clothing, the big baggie shirt, baggie pants, I didn’t think he would make a good juror whereas the other juror that I’m leaving on, the elderly gentleman in seat 12, I think he will make a great juror by contrast because his shirt is tucked in, he’s neat, he seemed serious, he gave good answers where the other juror seemed too laid back for me.” When the court asked “about the last [juror,] [the prosecution noted] . . . he had a nephew [who] went through a trial for carjacking and although [the potential juror] said [his nephew] was treated fairly . . . I don’t want to take a chance with having him have a nephew [who] went through an entire courtroom process, it is just too risky.”

The defense thereafter renewed its *Wheeler* motion and noted that after the court just made a ruling on the previous motion, “the very next peremptory was the

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<sup>1</sup> *People v. Wheeler* (1978) 22 Cal.3d 258.

African-American woman who . . . indicated that . . . if she were selected to stay on the panel, that she would be able to remain fair and impartial and remain focused on the trial.” The court concluded that a “prima facie showing at this point” had been made and asked the prosecution to explain its reasons for excusing the juror.

The prosecutor responded “[the potential juror] said she was on two prior juries, one was a hung jury and mistrial, she never reached a verdict. She has a cousin in jail and other relatives that have been arrested. None of those things are what I would call good signs for a fair juror and although it is not for cause, it is a peremptory . . . .”<sup>2</sup>

In response, the defense observed that the potential juror “specifically said that [her relatives] were in Montana. She had no contact with them. She didn’t know whether or not they had been treated fairly. It would not affect her ability to remain fair and impartial. [¶] [Defense counsel also noted] that there are several members presently in the jury seated that also had friends or relatives that have had some type of contact with law enforcement, so I don’t see that there is anything unique about this particular juror that would warrant her being excused but for race.”

In denying the *Wheeler* motion, the court concluded, based on the prosecution’s explanations, that the prosecution did not remove these three prospective jurors for race, but for other reasons. The court stated that “the only thing the court can do is say yes, there is a prima facie showing that certain people have been removed based on race so the court has to consider whether or not [the prosecution] has provided an explanation that can explain away the reasons for removal of these three prospective jurors other than race.”

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<sup>2</sup> The potential juror stated that in the trial in which the jury was unable to reach a verdict, the charge was robbery and the jurors honestly could not reach a decision. In the other trial in which a mistrial was declared, there was an insufficient number of jurors to proceed because “jurors kept falling off because the trial was so long.”

Appellant contends that the trial court stopped short of fulfilling its obligation as mandated by *Batson v. Kentucky* (1986) 476 U.S. 79 by accepting a race-neutral explanation of the challenge without examining the assertion for veracity.

We disagree. “‘If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. . . .’ [¶] . . . [¶] ‘If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses--i.e., for reasons of specific bias as defined herein. . . . [Our Supreme Court stated it will rely] on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination. [¶] . . . [¶] If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted.’ [Citations.] [¶] The high court has devised a similar test for determining when the discriminatory exercise of peremptory challenges violates the equal protection clause of the federal Constitution: ‘[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. [Citations.]’ [Citation.] [¶] . . . [¶] [T]he trial court ‘must make “a sincere and reasoned

attempt to evaluate the prosecutor’s explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .” [Citation.]’ [Citation.] But in fulfilling that obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor’s race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the prosecutor’s race-neutral reason for exercising a peremptory challenge is based on the prospective juror’s demeanor, or similar intangible factors, while in the courtroom. [¶] . . . [¶] The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. . . . All that matters is that the prosecutor’s reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. ‘[A] “legitimate reason” is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]’ [Citation.]” (*People v. Reynoso* (2003) 31 Cal.4th 903, 914-924.)

Under the standard of giving great deference to the trial court’s determination, we affirm the ruling in this case. The trial court did not fail to conduct a further analysis following the prosecution’s statement of race-neutral explanations for use of the peremptory challenges but rather made a sincere and reasoned attempt to evaluate the prosecutor’s explanation and based on those explanations found the prosecution did not remove these three prospective jurors for race, but for other reasons, in essence finding the prosecutions explanation’s to be “ sincere and genuine.” (*People v. Reynoso, supra*, 31 Cal.4th at p. 926.)

**DISPOSITION**

The judgment is affirmed.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.